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OBSTRUCTING JUSTICE

Thomas L. Jipping

On the Senate's first day back from the August recess, Sen.
Charles Schumer chaired another of his hearings designed to
change the confirmation rules and stack the deck against

President Bush's nominees.

At the first hearing, left-wing academics and lawyers told senators to base their votes on a nominee's ideology; that is, the rulings they will likely render once on the bench. At this hearing, left-wing academics and lawyers told senators to base their votes on whether nominees have made the case for confirmation rather than in deference to the president. As Mr. Schumer put it, "the burden should rest with the nominee."

This new rule would certainly facilitate Mr. Schumer's goal of defeating nominees; senators need only say that a nominee did not meet his burden. While this may be the system Mr. Schumer prefers, however, it is not the one America's Founders established.

In Article II, Section 2, the Constitution gives the president both the power to nominate and, subject to the Senate's "advice and consent," the power to appoint federal judges. As Alexander Hamilton put it in "The Federalist," No. 65, "In the business of appointments the executive will be the principal agent." That's why there's not a word about appointments in Article I, which outlines the powers of the legislative branch.

The Senate is a check on the president's appointment power, as Hamilton wrote in "The Federalist," No. 76, to "prevent the appointment of unfit characters." A primary power ? in this case, appointing judges ? carries more weight than a check on that power. Therefore, the Senate must show that a president's nominees are unfit in order to reject them; the burden is on the Senate, not on the nominee. That's the system of checks and balances America's Founders established, the one we all learned about in junior high civics class.

At the hearing, Mr. Schumer said America's Founders would be shocked at the state of the confirmation process today. Indeed, they would. Those who crafted the Constitution, who believed that the president would be the "principal agent" in judicial selection, would be shocked at Mr. Schumer insisting that the Senate is a co-equal partner with the president. Those who created the process of presidential nomination and appointment would be shocked at Mr. Schumer insisting that the Senate instead treat nominees as if they were applying for the job.

Sen. Strom Thurmond voiced the position America's Founders would recognize. He said the deference owed to a president should not change when the political party controlling the Senate or the White House changes. The Senate's constitutional responsibilities, Mr. Thurmond said, must remain consistent.

Consistency requires that Mr. Schumer practice what he has

preached. In January 1998, for example, he called on the Senate leadership to "work with the president to confirm more judges."

Consistency means he should direct this at leaders such as Sen. Patrick Leahy, chairman of the Judiciary Committee on which Mr. Schumer serves. Mr. Leahy said on July 25, 2000, that it is the Senate's "constitutional responsibility" to "redouble our efforts to work with the president" to confirm more judges. That was when there were just 59 judicial vacancies. With nearly 110 vacancies today, you'd think Mr. Leahy would re-quadruple his efforts to confirm even a few of the 40 nominees currently at his doorstep.

Consistency requires that Mr. Schumer direct this at senior Democrats such as Sen. Ted Kennedy, who in September 1999 said it was the Senate's "constitutional responsibility to work with the president" to confirm more judges. That was when there were just 68 vacancies.

Perhaps it just depends on the meaning of the word "president." Perhaps the only presidents senators such as Messrs. Schumer, Leahy and Kennedy want to work with are Democrats who nominate the liberal activist judges they need to impose their political agenda on the country.

This is all part of the same obstruction campaign Democrats have used in the past. The Sept. 1, 1992, edition of the New York Times reported that "the Democrats who control the Senate have begun to delay confirming some of President Bush's nominees for major judgeships to preserve the vacancies for to fill if he is elected president." As Ronald Reagan would say, there they go again.

Public presidential leadership is necessary to break this logjam. Judicial vacancies are the highest in more than seven years and confirmations are the slowest in recent memory. Just wait, Senate Majority Leader Tom Daschle will soon say, the press of legislative business leaves no time to consider judicial nominees. The clock is ticking, and Mr. Bush must turn up the heat and tell Americans the truth about the Democrats' obstruction campaign.

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